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No. 03-1618

IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF SACRAMENTO, INC.,
Petitioner,

v.

CALIFORNIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of California

BRIEF OF *AMICI CURIAE* THE FAMILY RESEARCH COUNCIL AND THE ALIANCE DEFENSE FUND IN SUPPORT OF PETITIONER

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INTEREST OF AMICI IN THIS CASE[1]

FAMILY RESEARCH COUNCIL ("FRC") is a nonprofit research and educational corporation headquartered in Washington D.C. FRC exists to reaffirm and promote the traditional family and the Judeo-Christian principles upon which it is built. FRC provides resources and guidance for families and promotes activities which are designed to strengthen traditional marriage.

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties. Its membership includes hundreds of lawyers and numerous public interest law firms. ADF has advocated for the rights of Americans under the First Amendment in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 500 cases and legal matters, including cases before the U.S. Supreme Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Troxel v. Granville*, 530 U.S. 57 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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[1] All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

California's Women's Contraception Equity Act ("WCEA") exempts some, but not all, religious organizations from having to provide contraception coverage to women, even though the law's purpose is to provide contraception coverage to women

This Court has held that a law that offers an exemption undermining its purpose is not generally applicable. A law that is not both neutral and generally applicable must meet strict scrutiny when applied to a Free Exercise Claim. However, there is a split among the circuits about what constitutes a generally applicable law. The California Supreme Court's decision below is in conflict with the view of the Third and Sixth Circuits on general applicability. It held that the WCEA is generally applicable even though it grants an exception undermining its purpose. The court subjected the law solely to rational basis review. This Court should grant the Petition for Certiorari to resolve the conflict between the California Supreme Court and the Third and Sixth Circuits, and affirm that a law granting an exemption undermining its purpose must meet strict scrutiny.

Moreover, a law that favors select religious organizations over others is not neutral. The WCEA favors religious organizations that only inculcate values and minister to their own members. It disfavors religious organizations that focus their efforts outside the church by doing things like feeding the hungry, caring for the sick, and providing shelter to the homeless. This Court should also grant the Petition to affirm that a law that prefers one religious organization over another is not neutral and must meet strict scrutiny when applied to a Free Exercise claim.

REASONS FOR GRANTING THE WRIT

BACKGROUND

California's Women's Contraception Equity Act ("WCEA") requires employers who provide prescription drug coverage to also provide contraception coverage. The WCEA exempts some, but not all, religious organizations.[2] One of the religious organizations not exempted is Catholic Charities.

A central mission of the Catholic Church is to evangelize those inside and outside its walls. For centuries the Church has carried out this mission in a variety of ways, the most distinctive of which is through its many works of charity.[3] Catholic Charities is the organ of the Church charged with carrying out this mission. The Church cannot

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[2]The relevant text of WCEA's exemption is:

> A) The inculcation of religious values is the purpose of the entity;
>
> B) The entity primarily employs persons who share the religious tenets of the entity;
>
> C) The entity serves primarily persons who share the religious tenets of the entity;
>
> D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A) i or iii, of the Internal Revenue Code of 1986, as amended.

Cal. Health & Saf. Code, § 1367.25 (b)(1).

[3] Catechism of the Catholic Church ("CCC") § 2447 citing Matthew 25:31-46. These works include "feeding the hungry, sheltering the homeless, clothing the naked, visiting the sick and imprisoned, and burying the dead." *Id.*

and will not cease to perform these works of mercy.[4] But in California, this mission makes it impossible for Catholic Charities to provide its workers prescription drug coverage. Thus, the WCEA puts the Diocese of Sacramento at a heavy disadvantage in attracting quality employees.[5]

Catholic Charities is not the only group whose religious beliefs are burdened by the WCEA. The Sisters of Charity, for example, presumably do not merit exemption because their purpose is to evangelize the poor by engaging in works of mercy. A Protestant church or organization that is compelled by its religious beliefs to operate a rescue mission, a food kitchen, or a pregnancy center would also fail to qualify for the state's exemption.[6] And the Salvation Army would almost certainly not qualify because its mission is to evangelize by working for the "social betterment of the poor."[7] Indeed, when asked about the Salvation Army being forced to provide domestic partners benefits for its employees in New York, Salvation Army spokesman George Hood responded, "We've got bigger problems in California."[8] He was referring to the Catholic Charities case.

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[4] CCC § 2448 (citation omitted). The Church's works of charity "remain indispensable always and everywhere." *Id.*

[5] Because it is not an option for the Bishop of Sacramento to provide prescription contraceptive coverage, Catholic Charities cannot offer prescription coverage. Thus, they are placed at a significant competitive disadvantage.

[6] It is not only the Catholic Church that objects to the use of contraception. *See, e.g.*, Sam Torode & Bethany Torode, *Open Embrace: A Protestant Couple Rethinks Contraception* (2002).

[7] Salvation Army International Heritage Center, *Who We Are and How We Work*, 2003, *available at* www1.salvationarmy.org/heritage.nsf/36c107e27b0ba.

[8] Mark A. Kellner, *Army Facing Battle on Benefits*, Christianity Today (July 12, 2004) available at www.christianitytoday.com/ct/2004/128/22.0.html.

The bottom line is that the WCEA, and its unconstitutional category of exemptions, places an unreasonable burden on religious organizations providing much needed services that lighten the load on government agencies.

A law that is not both neutral and generally applicable must meet strict scrutiny when applied to a Free Exercise claim. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). This Court has not fully explained the contours of this test, and there appears to be confusion among lower courts on how to decide whether a law is generally applicable. This confusion arises because of the holding in *Employment Division v. Smith* that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. 872, 879 (1990) (internal citation omitted). Some courts have taken this language, combined with the Court's mention of "individualized governmental assessment," to mean that strict scrutiny *only* applies when there is a system of ad hoc and individualized assessment.

In the decision at issue, the California Supreme Court held that although the WCEA exempts some, but not all, religious organizations, it was nonetheless neutral and generally applicable. *See Catholic Charities of Sacramento v. Superior Court*, 32 Cal. 4th 527, 537 (2004) (noting that the purpose of the law was to "eliminate gender discrimination in health care benefits and to improve access to prescription contraceptives"). The court's ruling on general applicability, however, is in conflict with decisions of the Third and Sixth Circuits.

Moreover, a law that prefers certain denominations or religious organizations over others is not neutral. *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another").[9] California's WCEA favors religious organizations that are inwardly focused, and discriminates against those that meet the needs of non-members. Nevertheless, the California Supreme Court held that the WCEA was neutral and generally applicable, and that the law need only meet rational basis review.

This Court should grant the Petition for Certiorari to resolve the conflict about how to determine whether laws are generally applicable and to correct the California Supreme Court's error in holding that a law favoring select religious organizations is neutral.

I. THE STANDARD FOR DETERMINING WHETHER A LAW IS GENERALLY APPLICABLE IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED BY THIS COURT.

A. This Court Has Ruled That A Law That Grants An Exemption That Undermines Its Purpose Is Not Generally Applicable.

Lukumi held that a law granting an exemption that undermines the law's purpose is underinclusive and not generally applicable. *Lukumi*, 508 U.S. at 543. Underinclusive laws "fail to prohibit non-religious conduct

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[9] In *Larson*, this Court used the terms "denomination" and "religious organization" interchangeably. *See, e.g., id.* at 253 (noting that the Act applies to "some religious organizations but not others").

that endangers [the law's] interest in a similar or greater degree" as the non-exempt conduct. *Id.*[10] Such a law should be suspect because it values certain classes of conduct over others when both exemptions have a similar impact on the law's effectiveness. "All laws are selective to some extent, but *categories of selection* are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* at 542 (emphasis added). "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* at 546.

This Court also requires that a law must be *both* neutral *and* generally applicable. "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. While the two requirements are "interrelated," they may not be conflated. This Court analyzed the law at issue in *Lukumi* to determine both its neutrality and its general applicability. *Id.* at 533-42 (determining the law's neutrality) and at 542-46 (determining the law's general applicability).

B. There Is A Conflict Among The Circuits On How To Determine Whether A Law Is Generally Applicable.

There is much confusion among the circuits on how to properly decide Free Exercise cases. Two circuits—the Third and Sixth—have held that categorical exemptions that undermine the purpose of the law are subject to strict or heightened scrutiny. Two other circuits—the Ninth and Tenth—apply strict scrutiny only where there is a system of

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[10] *See generally* Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850 (2001).

individualized, ad hoc exemptions that evidence hostility toward religion. The latter cases have capitalized on select language in *Smith*, without also looking to *Lukumi's* refinement of Free Exercise analysis.

1. The Third and Sixth Circuits hold that a law is not generally applicable if it makes a categorical exemption that undermines its purpose.

In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, the Third Circuit found that a police policy that granted exemptions undermining the purpose of the law was subject to strict scrutiny. 170 F.3d 359 (3d Cir. 1999). The policy prohibited officers from wearing beards, but offered exemptions to two categories: 1) officers that had medical reasons for wearing a beard; and 2) officers that were under-cover. *Id.* at 360. Two Muslim officers requested an exemption from the policy for religious reasons, but were denied. The court found that the City's reason for the policy was to promote uniform appearance among its officers, and that the exemption for medical reasons undermined that policy—it made the police officers' appearance non-uniform. *Id.* at 366. Thus, the policy as it was applied to the Muslim officers was subject to heightened scrutiny under the Free Exercise Clause. *Id.*[11]

The court found that the exemption for under-cover officers, however, would not subject the law to heightened scrutiny because the under-cover officers never dressed in uniform anyway, so their exemption did not undermine the

[11] The court applied only heightened scrutiny "since this case arose in the public employment context and since the Department's actions cannot survive even that level of scrutiny." *Fraternal Order of Police*, 170 F.3d at n.7.

policy's purpose. *Id.* at 365-66. The Third Circuit affirmed this holding in *Tenafly Eruv Association v. Borough of Tenafly*, acknowledging that its decisions are in disagreement with two of its sister circuits. 309 F.3d 144, 165-66 (3d Cir. 2002). "We note that, in contrast to our decision in *Fraternal Order of Police*, two other circuit courts have stated that the Free Exercise Clause offers no protection when a statute or policy contains broad, objectively defined exceptions not entailing subjective, individualized consideration." *Id.* at 167 n. 27 (citing *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998) and *Am. Friends Serv. Comm. v. Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991)).

Earlier, in *Kissinger v. Board of Trustees*, the Sixth Circuit found that a University policy was generally applicable because it did not grant *any* exceptions. 5 F.3d 177, 179 (6th Cir. 1993). In that case, a student asked to be exempt from a course in which "healthy animals are anesthetized, operated upon, and then killed. *Id.* at 178. The student asked to enroll in an alternative course because killing healthy animals violated her religious beliefs. *Id.*

The court found that because the law did not offer any exceptions, it was "generally applicable to all students," and therefore satisfied *Smith's* requirement. *Id.* at 179.

2. The Ninth And Tenth Circuits Hold That A Law Is Generally Applicable Unless There Is An Individualized System Of Ad Hoc Exemptions.

In *Axson-Flynn v. Johnson*, the Tenth Circuit held that even though a University policy allowed categorical exemptions, the proper question was whether there "was a

pattern of ad hoc discretionary decisions amounting to a 'system.'" 356 F.3d 1277, 1299 (10th Cir. 2004). In that case, a university student requested an exemption from having to say certain obscenities in an acting class. The school denied that request, but granted an exemption to a student who wanted to be exempt from acting requirements on Yom Kippur. *Id.* at 1298. Although the exemption undermined the purpose of the policy, the court would only apply strict scrutiny if there were a system of individualized, ad hoc exemptions. *Id.* at 1299.[12] But the court acknowledged that "courts and commentators are divided on the question" of how to apply the test in *Smith*. *Id.* at 1297.

In *American Friends Service Committee Corporation v. Thornburgh*, the Ninth Circuit analyzed a law that required employers to verify the immigration status of its employees. 961 F.2d 1405 (9th Cir. 1992). A Quaker company had been denied an exemption and sued on Free Exercise grounds. The court found the law generally applicable because the state did not have a system of "individualized exemptions," even though it made exemptions for independent contractors and household employees. *Id.* at 1408-09.

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[12] *See also Swanson v. Guthrie*, 135 F.3d 694, 701 (10th Cir. 1998) (looking only for a "system of individualized exceptions that give rise to the application of a subjective test" despite evidence of categorical exemptions).

II. THE DECISION OF THE CALIFORNIA SUPREME COURT CONFLICTS WITH THE DECISIONS OF THE THIRD AND SIXTH CIRCUITS.

A. The California Supreme Court Held That A Law With An Exception Undermining Its Purpose Was Generally Applicable.

The decision of the California Supreme Court conflicts with the decisions of the Third and Sixth Circuits on how to apply the *Smith* and *Lukumi* test. The Third and Sixth Circuits hold that a law offering categorical exemptions undermining its purpose is not generally applicable. The California Supreme Court, however, conflated neutrality and general applicability, and held that although the WCEA offers categorical exemptions undermining its purpose, it is nonetheless generally applicable.

The California Supreme Court assumed that because neutrality and general applicability were "interrelated," they could be analyzed under the same standard. *Catholic Charities*, 32 Cal. 4th at 550-51. Thus, the California Supreme Court did not separately analyze whether the WCEA is generally applicable. The court instead simply looked to see if the law was facially neutral or "gerrymandered the law to reach only Catholic employers." *Id.* at 550.

The court's analysis differs markedly from that of the Third and Sixth Circuits because it did not seem concerned with whether there was an exception, and whether that exception undermined the purpose of the law.[13] But the

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[13] Instead of addressing the burden on Catholic Charities, in comparison to the exception, the court undertook an unrelated discussion of whether

WCEA's exception does undermine the purpose of the law—to provide prescription contraception to women—by exempting certain religious organizations from having to provide prescription contraception coverage for female employees. *Id.* at 565 (recognizing that the exemption "increases the number of women affected by discrimination in the provision of health care benefits"). The exemption facially and as applied discriminates among religious organizations based on their practices. Thus, the California decision is in conflict with the decisions of the Third and Sixth Circuits on whether such a law is generally applicable.

B. *Smith* Does Not Support the California Supreme Court's Decision.

The California Supreme Court used this Court's decision in *Smith* to support its opinion. *See, e.g., Catholic Charities*, 32 Cal. 4th at 541. But because the law at issue in *Smith* did not have an exception that undermined its purpose, it was generally applicable.

A law that makes exemptions may or may not be generally applicable, depending on the nature of the exemptions and the purpose of the law. For example, in *Smith* the purpose of the law was to protect the health and safety of the state's citizens, and it granted an exemption to use peyote for medical reasons as prescribed by a doctor. *Smith*, 494 U.S. at 874. The law was still generally applicable even though it failed to exempt religious use because the exemption did not undermine the purpose of the law—the health and safety of the state's residents. In fact, such a law would arguably advance the health and safety of

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the legislature may accommodate religion at all. *Id.* at 551-52. Catholic Charities' point was that if the legislature chooses to accommodate religious practices it may not pick and choose which practices to exempt.

the individual if it was prescribed by a doctor within a controlled environment. Thus, the law in *Smith* was generally applicable.

But if the law in *Smith* had granted an exemption for peyote use to any religious group whose primary purpose was to inculcate religious beliefs and minister to those within its membership, while excluding religious groups providing social services, the law would not have been generally applicable. The exemption would have undermined the purpose of the law by granting an exception that was harmful to the health and safety of those who used the drug. Such an exemption would have been subject to strict scrutiny. That is the kind of exemption California provided to the WCEA. Accordingly, *Smith*'s holding on laws of general applicability does not support the California Supreme Court's decision.

This Court should clarify that neutrality and general applicability are not synonymous, and that laws that grant exceptions undermining the purpose of the law are not generally applicable.

III. THE CALIFORNIA SUPREME COURT'S STANDARD FOR NEUTRALITY CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. A Law That Makes Distinctions Among Religious Organizations Is Not Neutral.

The irreducible minimum of the First Amendment is that the government must be neutral toward religion. *Lukumi*, 508 U.S. at 532. The Free Exercise and Establishment Clauses compliment one another to ensure

that the government does not prefer one religious organization over another. *Larson v. Valente*, 456 U.S. 228, 245 (1982) ("constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause").[14] As this Court stated in *Larson*, "when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny adjudging its constitutionality." *Id.* at 246.

In *Larson*, this Court struck down a law very similar to California's WCEA. In that case, the law disfavored religious organizations that solicited more than 50% of their funds from non-members. The law was unconstitutional because it made distinctions *between* religious organizations. *Id.* at 255. This sort of law violates the "clearest command" of the Establishment Clause—one religious organization may not be preferred over another.

A law that prefers certain religious organizations over others, based on whether their activities are public or private, is a prime example of a non-neutral law and must meet strict scrutiny.

B. California's WCEA Is Not Neutral Because It Favors Select Religious Organizations.

The WCEA prefers denominations or religious organizations that only inculcate religious values and minister to those within their own walls. Cal. Health & Saf. Code, § 1367.25 (b)(1)(A & C). It disfavors those groups that focus their efforts outside the church by doing things

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[14] *See also Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 272-273 (1951).

like "feeding the hungry, caring for the sick, and providing shelter to the homeless." *Catholic Charities*, 32 Cal. 4th at 571 (Kennard, J., concurring). The legislature apparently believed that it was entitled to weigh the religious value of ministries, depending upon their activities—the legislature concluded that private religion is more important than public religion. But the California Supreme Court held that the law was nonetheless neutral. *Id.* at 549.

To reach this result, the court looked at the WCEA as an accommodation to religion instead of as a religious preference. The court stated that "[b]ecause a legislative accommodation benefits religion, it is tested not under the free exercise clause but under the establishment clause." *Id.* at 551. The court then analyzed the WCEA's exemption—or "accommodation"—to ensure that it did not violate the Establishment Clause. *Id.* at 551-52.

The court suggested that because the exemption is gratuitous, the WCEA need not be neutral. So because the state is not required to grant an exemption at all, any exemption given is of the state's grace and is only subject to a *Lemon* analysis rather than *Larson* or *Lukumi*. Thus, with a slight twist in perspective, a non-neutral law becomes an accommodation of religion, and the state becomes a benefactor rather than a villain.

Whether California considers its choice an exemption or an accommodation, however, is irrelevant—either way the selection must be neutral. California need not offer any exemption. But when it does offer an exemption, it must be religiously neutral. The state may not choose which groups to exempt based on the external characteristics or types of religious organizations. California's law is inherently non-neutral because it prefers certain religious practices over others.

The court also ruled that "while the WCEA may treat some Catholic employers more favorably than other employers, the WCEA does not under any circumstances treat Catholic employers less favorably than any other employers. About a law such as this, *Larson* has nothing to say." *Catholic Charities*, 32 Cal.4th at 554. Essentially the court held that the state did not engage in religious preference because "the WCEA applies to religious and nonreligious organizations equally." *Id.*

As Justice Kennard's concurrence points out, however, the law at issue in *Larson* is "substantially similar" to California's WCEA—the Minnesota law in *Larson* treated non-religious groups just the same as religious groups not qualifying for the exemption. *Id.* at 570. The relevant question is whether one religious organization or practice is favored or preferred. *Larson*, 456 U.S. at 244. Both the Minnesota law in *Larson* and California's WCEA prefer certain religious organizations over others based on the characteristics and practices of the organization. Justice Kennard rightly concluded that such a law is subject to strict scrutiny.[15]

If a law that carves out exemptions only for select religious groups is neutral, then there is no such thing as a non-neutral law. This Court should correct the California Supreme Court's misinterpretation of *Smith's* neutrality requirement.

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[15] Justice Kennard did not dissent because Catholic Charities did not qualify under the fourth prong of the WCEA's exemption that requires it to be exempt from federal tax filing. *Catholic Charities*, 32 Cal.4th at 569. But to qualify as a religious organization, the fourth prong of the exemption essentially relies upon the same kind of distinction between spiritual and secular, private and public, that Justice Kennard thought required strict scrutiny. .

CONCLUSION

Amici respectfully requests that this Court grant the Writ of Certiorari to affirm that: (1) neutrality and general applicability are analyzed separately under *Smith* and *Lukumi*; (2) a law granting an exemption that undermines its purpose is not generally applicable; and (3) a law that disfavors religious organizations based on their activities is not neutral.

Respectfully submitted,

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